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United Nations Commission on International Trade Law
Thirty-fifth session

Summary record of the 748th meeting
Held at Headquarters, New York, on Friday, 21 June 2002, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

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Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*)

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Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

02-43609 (E)

In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 3.10 p.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514; A/CN.9/XXXV/CRP.3)

Draft article 3. Variation by agreement (*continued*)

1. **The Chairman** invited the Commission to resume consideration of France's proposal to include a reference to draft article 15 in draft article 3, making enforceability of the settlement agreement one of the mandatory provisions, which parties could not vary by agreement.

2. **Ms. Moosa** (Singapore) said that, on reflection, her delegation could not agree with the French proposal because it would undermine the principle of party autonomy and would be inconsistent with footnote 4 of draft article 15.

3. **Mr. Shimizu** (Japan) said that his delegation was reluctant to see a reference to draft article 15 included in draft article 3. Draft article 15 had intentionally been left open to State interpretation. Footnote 4 provided that an enacting State might consider the possibility of making a procedure for the enforcement of settlement agreements mandatory. Since the nature of draft article 15 was left open, the decision whether to include a reference to it in draft article 3 should also be left to a State's discretion. A footnote to draft article 3 might be drafted explaining that a reference to draft article 15 would depend on the decision of the enacting State with regard to draft article 15.

4. **Mr. Markus** (Observer for Switzerland) said that his delegation could support the French proposal with the reservations previously stated, namely, that although the parties could not give their settlement agreement a greater degree of enforceability than national laws allowed, they might agree to exclude its enforceability in whole or in part.

5. **Ms. Moosa** (Singapore) pointed out, with reference to Switzerland's position, that it was not necessary to stipulate that parties could not give their settlement agreement a greater degree of enforceability than national laws allowed, because from a practical standpoint the mechanisms for enforcement simply would not exist. As another point in favour of flexibility, there might be circumstances in which a dispute was settled merely by one party tendering an apology and the other accepting it. It was hard to imagine how such a settlement could be enforced.

6. **The Chairman** said that, despite some support for the French proposal, the majority of the members seemed to be in favour of leaving draft article 3 as it stood.

7. *Draft article 3 was provisionally approved.*

Footnote 1 of draft article 1 (A/CN.9/XXXV/CRP.3)

8. **Mr. Sekolec** (Secretary of the Commission) introduced conference room paper A/CN.9/XXXV/CRP.3 setting forth proposed changes in the text in the event that States wished to enact the Model Law to apply to domestic as well as international conciliation. Paragraph 1 of A/CN.9/XXXV/CRP.3 presented proposed draft text for incorporation in footnote 1 of draft article 1, and paragraph 2 contained proposed draft text for inclusion in paragraph 47 of the draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (A/CN.9/514).

9. The conference room paper was the result of a compromise whereby the body of the Model Law would apply only to international conciliation but the footnote would help countries to adapt it if they wished to apply its provisions domestically. A change in the proposed text for inclusion in paragraph 47 of the draft Guide was necessary in order to bring it into line with the paragraph of the Model Law to which it referred. The reference to a sole or third conciliator in paragraph (5) of draft article 6 on appointment of conciliators had been removed as being too reminiscent of arbitration. Therefore, in the proposed text for paragraph 47, wherever "with respect to a sole or third conciliator" appeared, it should be replaced by "where appropriate". Naturally, all paragraph and article references would be corrected to match the final version of the Model Law.

10. **The Chairman** drew the Commission's attention to the need to choose between two alternatives in footnote 1 in relation to paragraph (5) of draft article 1. The first option was merely to delete the paragraph. The second option was to replace the paragraph with the words, "This Law also applies when the parties so agree".

11. **Mr. Morán Bovio** (Spain) said that the proposed text would be helpful to States that did not already have legislation on domestic conciliation and wished to adapt the Model Law to their needs. With regard to the alternatives mentioned, his delegation thought the second alternative was clearer and extended the effect of the Commission's work.

12. **Ms. Moosa** (Singapore) said that her delegation supported the second alternative, but she proposed an amended wording to make it more evidently parallel to the wording of draft article 1, paragraph (5): "This Law also applies to a commercial conciliation when the parties agree to the applicability of this Law."

13. **Mr. Markus** (Observer for Switzerland) said that he wondered what cases were envisaged in which the parties could agree to the applicability of the Model Law. If the Law applied strictly to international conciliation, the parties could agree, pursuant to article 1, paragraph (5), that the conciliation was to be regarded as international or that the Law should apply irrespective of the domestic nature of the conciliation. However, if the Law applied to both domestic and international conciliation, the need for such an agreement fell away. At an earlier stage the decision had been made in the Working Group to rule out applicability to private international law. The only possibility that suggested itself was that the parties might agree that the Law should apply even if their dispute was non-commercial in nature.

14. **Mr. Sekolec** (Secretary of the Commission) said that the drafting of the second alternative had been based on two considerations. First, in very informal conciliations, there might be some doubt whether the Model Law applied, unless the parties agreed that it was applicable. Second, the place of conciliation was often hard to determine, so that agreement by the parties would supply the choice of law. Applicability to non-commercial conciliation had not been considered.

15. **Ms. Renfors** (Sweden) said that it was important not to give the impression that the Model Law applied to non-commercial conciliation.

16. **Mr. Sekolec** (Secretary of the Commission) said that the question of whether parties to non-commercial disputes might agree to the applicability of the Law was not one the Law itself should resolve. That was a matter of public policy in the country concerned. However, the formulation suggested by Singapore might answer Sweden's concern.

17. **Mr. Holtzmann** (United States of America) said that there might be borderline situations in which parties were in doubt whether their transaction fell within the definition of commercial contained in footnote 2 of draft article 1, and an agreement between parties would remove all doubt. There was a value in allowing parties to opt in to the Law, and for that very reason Singapore's formulation was less attractive.

18. **Ms. Moosa** (Singapore) said that in the light of the remarks by the representative of the United States, she withdrew her proposal. She had noted that there was no reference to "commercial" conciliation in the remainder of the text.

19. **The Chairman** suggested the Commission approve the text of A/CN.9/XXXV/CRP.3, with the second alternative wording in paragraph 1: "Replace paragraph 5 of article 1 with the words 'This Law also applies when the parties so agree.'"

20. **Mr. Shimizu** (Japan) said he had difficulty in understanding the observation by the United States representative, namely, that that wording would enable the parties to apply the Model Law in cases where they were unsure about the nature of the conciliation. On an objective judgement, a conciliation must be either commercial or non-commercial. If it was the former, there would be no need for a separate agreement; if the latter, the Model Law could apply by agreement, but was that really the intention in the draft?

21. **The Chairman** said the problem did not lie in the footnote; it had arisen in connection with draft article 1, paragraph (5). It might need some elucidation in the Guide to Enactment.

22. **Mr. Heger** (Germany) said it was apparent that the Model Law was intended to apply in cases where the parties agreed it should. However, according to draft article 1, paragraph (1), it was supposed to apply only to commercial conciliations. He was puzzled why it was now being proposed that the parties should have the power to decide that their conciliation would be subject to the Model Law even though the dispute was not a commercial one.

23. **Mr. Sekolec** (Secretary of the Commission) said that, according to footnote 2 to the draft Model Law (A/CN.9/506, annex), the term "commercial" was to be given a wide interpretation. Because the relationships to be regarded as commercial fell into different categories, some conciliations might well fall into a

grey area, so it would be useful to provide some certainty. If the wording of draft article 1 was adopted without the proposed footnote, the Model Law would apply to both international and domestic commercial conciliations. If the proposed footnote were approved, the words "to a commercial conciliation" in draft article 1, paragraph (5), should be deleted. That would be in line with the Model Law on International Commercial Arbitration, whereby the parties could agree that a relationship was international if they were unsure whether it was or not.

24. **Mr. Lefebvre** (Canada) thought it would be best to take a pragmatic approach, leaving it to the parties to decide whether the Model Law would apply. Courts should not have to determine whether a dispute was commercial in nature.

25. **The Chairman** said that the effect of deleting paragraph (5) of draft article 1, while retaining the proposed footnote, would be that countries which adopted the Model Law could bring non-commercial conciliations within its reach.

26. In reply to a query by Mr. Jacquet (France), he confirmed that that was in fact what the Commission was now considering.

27. **Mr. Jacquet** (France) pointed out that draft article 1 dealt entirely with international conciliations, and would have to be significantly amended as a result, as would draft article 2. He emphasized that the latter required the Model Law to be interpreted bearing in mind its international origin, for the sake of ensuring uniformity of interpretation.

28. **The Chairman** said that the Model Law on International Commercial Arbitration had been incorporated into Mexican law to apply equally to domestic and international arbitrations. However, the legislators now felt they had made a mistake in omitting an interpretation clause from the Mexican arbitration law. Without draft article 2, the effects of the Model Law could differ as between domestic and international proceedings; with it, uniformity of interpretation could be achieved by reference to the "international origin" of the Law.

29. **Mr. Kovar** (United States of America) said it was important to clarify the issues under discussion. The Commission was dealing with two possible alternative formulations for draft article 1, paragraph (5), but was unclear about the consequences of choosing the second option. Did it mean that a dispute, in order to be conciliated, need not be commercial in character, because the parties could opt for conciliation anyway, or that the requirement of a commercial character would continue to apply? If paragraph (5) were deleted and replaced by "This Law also applies when the parties so agree", that would mean that the domestic application of the Law would not necessarily require the commercial standard to be met. If that was not the Commission's intention, some redrafting would be necessary.

30. **The Chairman** said the secretariat was proposing the replacement of paragraph (5) of draft article 1 by: "This Law also applies to commercial conciliations when the parties so agree". The interpretation of paragraph (5) could be elucidated in the Guide to Enactment. Meanwhile, a decision had to be made between the two alternative wordings, as set out in the proposed footnote (A/CN.9/XXXV/CRP.3).

31. **Mr. Shimizu** (Japan) said his delegation preferred the first of the two options for paragraph (5), because paragraph (7) allowed parties to exclude the application of the Model Law.

32. **The Chairman** said a possible solution would be to delete paragraph (5) altogether.

33. **Mr. Heger** (Germany), supported by **Mr. Markus** (Observer for Switzerland), **Mr. Zanker** (Australia), **Mr. Renfors** (Sweden) and **Mr. Jacquet** (France) agreed with the representative of Japan in preferring the first option. The second option would open the possibility of the Model Law applying to non-commercial conciliations, which did not properly fall within its scope.

34. **The Chairman** said he took it that the Commission approved the footnote to draft article 1, as amended, and decided to delete paragraph (5) of draft article 1.

35. *It was so decided.*

36. **Mr. Kovar** (United States of America) asked whether there was any need to revise draft article 2, paragraph (1), in light of the domestic applicability of the Model Law.

37. **The Chairman** said that both the Model Law on Electronic Commerce and the Model Law on Cross-Border Insolvency contained provisions enabling the text to be applied to both domestic and international

cases. It would be very regrettable if the articles of the new Model Law were given a different interpretation in the two contexts.

38. **Mr. Morán Bovio** (Spain) said the emphasis on the international origin of the text was intended to avoid differences in the jurisprudence of countries which adopted it. That emphasis should be retained, to ensure a unitary approach to the application of the Model Law.

The meeting was suspended at 4.20 p.m. and resumed at 5.05 p.m.

Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (A/CN.9/514)

39. **Mr. Sekolec** (Secretary of the Commission) said that the draft Guide to Enactment and Use had been based on the draft text of the Model Law that appeared in the annex to document A/CN.9/506, and would require redrafting in the light of the changes made at the current session. Based on the recommendations of the Commission, the final text would be prepared and published subsequently by the secretariat. It would not come before the Commission for adoption. Earlier model laws had been accompanied by guides to enactment, which had been addressed solely at legislators. The expanded name "Guide to Enactment and Use" reflected the fact that it was also designed to help those using and interpreting the text.

Purpose of the Guide (paras. 1-4 of the draft Guide)

40. **Mr. Holtzmann** (United States of America) said that paragraph 4 would need to be amended to reflect the fact that the Guide was not due to be adopted by the Commission.

Introduction to the Model Law (paras. 5-25 of the draft Guide)

41. **Mr. Holtzmann** (United States of America) said that the definition of conciliation given in paragraph 5 failed to include the key element of the request made by parties for a third person to assist them in settling a dispute. In paragraph 6, it should be clarified that the degree of control that parties retained over the process differed from one part of the Model Law to another. Under some but not all provisions, one party might be entitled to act alone, and according to other provisions, the conciliator controlled the procedure unless the parties stated otherwise. Even though the phrase "alternative dispute resolution" was sometimes taken to include arbitration, the definition given in paragraph 7 excluded it completely. If a definition of the phrase was given at all, it should at least be a more accurate reflection of the two interpretations.

42. The material in paragraphs 5 to 10 should be reorganized with a view to emphasizing the advantages of conciliation. There were a variety of reasons why conciliation could be presented as an attractive alternative, but they needed to be brought out more clearly in the Guide. In paragraph 9, it was inaccurate to state that the admissibility of evidence could be governed by sets of rules such as the UNCITRAL Conciliation Rules. Only laws could guide the courts in determining questions of admissibility.

43. **Mr. Jacquet** (France) said that, in his view, it did not encourage parties to use conciliation to refer to it as "alternative" or "non-adjudicative" dispute resolution. While the definition given in paragraph 7 was not totally inaccurate, it could be redrafted to present conciliation as a more attractive alternative.

44. **Mr. Holtzmann** (United States of America) said that it was debatable whether the Model Law would help to increase stability in the market place, as suggested in paragraph 13, even though conciliation presented a number of other advantages, such as friendliness and cost efficiency. Similarly, it was an exaggeration to describe the objectives of the Model Law as essential for international trade, and paragraph 14 should be amended accordingly. Too much historical detail was given in paragraphs 16 and 17, particularly in relation to arbitration, which tended to constitute a distraction from the focus of the Guide.

45. **Mr. Morán Bovio** (Spain), commenting on the suggestion made by the United States delegation, said that although the section on background and history could be shortened somewhat, it should include a summary of the key moments in the history of the text. A historical overview would be very helpful to legislators who might wish to seek further information on the UNCITRAL web page, look for specific documents or consult with national delegates. It would also be helpful in that it would show a timeline of the Commission's work on the Model Law.

46. **Mr. Zanker** (Observer for Australia) said he agreed with the United States delegation that paragraphs 16 and 17 distracted attention, and it would be better to leave them out. If material relating to the development of texts was to be included, it would be better to show it in tabular form and place it at the back of the document. The table could include cross-references to the papers that had been generated by the Working Group in the course of its discussions.

47. **Mr. Holtzmann** (United States of America) said that the section on structure of the Model Law should be redrafted to focus on avoiding spillover, in other words to deal with what happened with information that was elicited during conciliation if the conciliation did not succeed. That emphasis could be inserted somewhere in paragraphs 20-23, perhaps paragraph 22.

Article-by-article remarks

Article 1. Scope of application (paras. 26-35 of the draft Guide)

48. **Mr. Kovar** (United States of America) recalled that in the discussions on article 1, paragraph (2), his delegation had stressed the importance of clarifying whether a particular series of events constituted a conciliation within the definition of article 1, paragraph (2). A court should consider any evidence that the parties did or did not have an understanding that conciliation existed and that there was a consequent expectation that the provisions of the Model Law would apply.

49. Under the terms of article 1, paragraph (7), the Law would apply to a conciliation conducted by a court. Under paragraph (8), the law would not apply to cases where a judge or an arbitrator, in the course of a court or arbitral proceeding, attempted to facilitate a settlement. In the discussion of article 1, paragraph (8), paragraph 35 of the Guide did not reproduce the wording "attempts to facilitate a settlement" but rather spoke of the court undertaking "a conciliatory process". The Guide should reflect the difference between the situation in which a court or judge acted not as a conciliator but rather as a facilitator of a settlement and the situation where a judge or arbitrator acted as a conciliator. In the case where a judge did not act as a conciliator, the law did not apply; however, when he put on the hat of a conciliator, the law did apply. The difference could be determined by the fact that in the circumstance of paragraph (8), the court acted on its own initiative or at the request of one party, perhaps, but not of both parties. If a court, acting on its own motion, attempted to facilitate a settlement, it was not acting as a conciliator; however, the moment the two parties came to the judge and requested assistance, the judge then became a conciliator, and he then was governed by the provisions of the Model Law. The matter should be clarified in the Guide.

50. **Mr. Shimizu** (Japan) suggested that the following wording should be included in paragraph 31: "Article 1 is not intended to interfere with the operation of the rules of private international law."

51. **Mr. Tang** Houzhi (China) said that his delegation agreed with the content of article 1, paragraph (8). The Model Law did not apply to procedural questions such as the number of conciliators that were needed or how they should be designated. It was important to stress the neutrality of the Model Law on procedural questions. He suggested that the following sentence should be included in paragraph 35 or some other appropriate place in the Guide: "The Model Law is not intended to indicate whether or not a judge or an arbitrator may conduct conciliation in the course of court or arbitration proceedings."

52. **Mr. Zanker** (Observer for Australia) noted that paragraph 27 stated that the term "commercial" was defined in footnote 2 to article 1, paragraph (1); later on, however, that same paragraph went on to say that no strict definition of "commercial" was provided in the Model Law. In order to avoid confusion, it would be preferable to stick to the "illustrative list" terminology rather than using the word "definition" in referring to the footnote.

53. **Mr. Sekolec** (Secretary of the Commission) asked the United States delegation for clarification of his remarks regarding the second sentence of paragraph 35. In the course of drafting the Model Law, it had been established that the process of facilitating a settlement could be carried out by a judge either at the request of the parties or in the exercise of the judge's prerogative, in other words, on his or her own motion. He was not sure whether he had understood correctly that the United States had suggested that article 1, paragraph (8), should be restricted only to cases where the judge acted on his or her own motion.

54. **Mr. Holtzmann** (United States of America) responding to the Secretary's request for clarification, said that as he recalled the discussion on article 1,

paragraph (8), the phrase "to facilitate a settlement" had been used in order to avoid using the word "conciliation". That had been done because when a judge or arbitrator put on the hat of a conciliator, he or she was subject to the Model Law while performing the functions of a conciliator. Under the Chinese system, the arbitrator could become a conciliator for a while and then go back to being an arbitrator. Whether the provisions of the Model Law relating to spillover, confidentiality and related provisions applied or not depended on which hat the judge or arbitrator was wearing. When he was wearing the hat of one who attempted to facilitate a settlement, he was wearing a judge or arbitrator's hat.

55. The text called for a difference, and the difference was found in the definition of conciliation in article 1, paragraph (2). That definition meant that, if both parties requested, and the judge or arbitrator said "yes", then the judge's action fell within the scope of conciliation and all the provisions of the law which governed and protected parties in the event of conciliation applied. But if the elements of the definition were not met, then the provisions of the Model Law did not apply. It was useful to alert parties, judges and others that the phrase "facilitate a settlement" had a different meaning than "conciliation" and that reference must therefore be made to the definition of "conciliation". His delegation agreed with the Chinese delegation that it should be clearly established that the Model Law did not prevent an arbitrator from changing hats back and forth. Practices differed in different systems, and the Model Law was neutral on that point. That should be noted later on in connection with draft article 13, on the conciliator acting as arbitrator.

The meeting rose at 6 p.m.

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United Nations Commission on International Trade Law
Thirty-fifth session

Summary record of the 749th meeting
Held at Headquarters, New York, on Monday, 24 June 2002, at 10 a.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) (Mexico)

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02-43891 (E)

In the absence of Mr. Akam-Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 10.10 a.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/487, A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514; A/CN.9/XXXV/CRP.1 and Add.1-9)

Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (A/CN.9/514)

Article 1. Scope of application (paras. 26-35 of the draft Guide) (continued)

1. **Mr. Inoue** (Japan) asked for clarification of article 1, paragraph (8): he wished to know whether the Model Law was considered not to apply to what was termed "court-annexed conciliation", which did not match the definition of conciliation given in article 1, paragraph (2).

2. The Chairman said that paragraph 14 of addendum 1 to the draft Report on the thirty-fifth session (A/CN.9/XXXV/CRP.1/Add.1) discussed that issue, and that it could be referred to the secretariat in the light of discussions in the drafting group if necessary.

Article 3. Variation by agreement (para. 38 of the draft Guide)

3. **Mr. Jacquet** (France) pointed out that paragraph 38 referred both to the principle of party autonomy and to leaving to the parties almost all matters that could be set by agreement. For the sake of consistency, he suggested that paragraph 38 should instead state that the parties had a general power of derogation over all the articles of the Model Law. That power of derogation was not quite the same as party autonomy, a concept which he thought was best reserved for those articles of the Model Law which contained the phrase "unless otherwise agreed". Operating that distinction would ensure that using the phrase "unless otherwise agreed" was not construed as invalidating article 3 of the Model Law.

4. **The Chairman** said he had understood from his law studies that "derogation" was a term reserved for the legislative authorities, and that the phrase might have to be expanded using a qualifier such as "derogation by the parties" to distinguish it from derogation carried out by the legislative authorities.

5. **Mr. Jacquet** (France) said that the issue which the Chairman had raised was covered by the title of the article itself ("Variation by agreement"); all he wished was to see the body of paragraph 38 of the Guide reflect its own title, and use the terms in that title, rather than refer only to party autonomy.

6. **The Chairman** pointed out that the term "derogation" seemed confined to the French-language version of the draft Model Law and draft Guide. Other languages did not use that term (Spanish used "*modificación mediante acuerdo*").

7. **Mr. Holtzmann** (United States of America) raised several issues in connection with the French delegation's remarks. First, he disagreed with the view that the exercise of party autonomy and the ability to vary the terms of the draft Model Law were two separate matters. He believed that variation was simply an example of exercising party autonomy. Second, with regard to the term "derogation", article 1 of the UNCITRAL Arbitration Rules offered an example of several terms being used to denote the same concept: the first paragraph stated: "... such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing", while the second stipulated that the Rules should apply "except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail." As UNCITRAL documents used a variety of terms to describe that phenomenon, he considered that the provisions of the draft Guide were fully adequate, though he was not opposed to further explanation being added to it.

8. Third, he wished to point out that phrases such as "unless otherwise agreed" had been included in some articles and not in others simply for reasons of user-friendliness: the parties would not have to have uppermost in their minds the fact that article 3 of the Model Law applied very nearly across the board. The intention had certainly not been to weaken article 3, but rather to remind the parties of its existence. He suggested that paragraph 38 of the Guide should

explain that where the phrase "unless otherwise agreed" was used in an article of the Model Law, it in no way implied that article 3 of the Model Law failed to apply to those articles from which it was absent.

9. **The Chairman** said that the secretariat would take account of the remarks made when deciding on the wording of the Guide. He had been advised by the secretariat that the positions of the French and United States representatives might not be compatible with each other. There was no technical difference between the general rule set out in article 3 of the draft Model Law and the specific sentence "unless otherwise agreed" added to some of the articles to make them clearer.

10. **Mr. Jacquet** (France) said that his only concern was clarity. Article 3 specified that the parties could agree "to exclude or vary" ("*écarter ou modifier*") any of the provisions of the Model Law. He would be satisfied if paragraph 38 of the draft Guide made it clearer that those two options existed. "Exclude" denoted "variation by agreement" proper, while "vary" denoted an alteration which the parties had adopted independently.

Article 4. Commencement of conciliation proceedings (paras. 39-44 of the draft Guide)

11. **Mr. Holtzmann** (United States of America), referring to the draft footnote to article 4, which proposed an article X regarding the suspension of the limitation period for the claim to which a conciliation proceeding related, said that in earlier discussions it had been suggested that the Guide should alert parties to the fact that if they adopted article X, additional stipulations might be unavoidable in order to cope with potential future difficulties. Such difficulties included determining the exact start and end of the suspension of the limitation period for the claim, since the Model Law, having been left deliberately flexible, contained no such details. Parties would have to weigh up the advantages and disadvantages of adopting an article on suspension of the limitation period, as it would bring adverse consequences, namely, less flexibility and more need for additional stipulations. The Commission should remain neutral, but still point out that adopting an article X was not without implications.

12. **The Chairman** said that he had serious doubts about the United States proposal. The Commission had decided that the Guide should set out the pros and cons of article X, which was a commitment between the parties and therefore did not lend itself to being treated as a derogation. He also found it difficult to reconcile placing in a guide covering an UNCITRAL text which had been agreed upon, and was intended for adoption as a model, a suggestion that that very text might be imprecise or in need of change. Paragraphs 21 and 22 of addendum 1 to the draft Report on the thirty-fifth session (A/CN.9/XXXV/CRP.1/Add.1) had thoroughly covered the arguments regarding article X, and a decision had been taken accordingly.

13. **Mr. Holtzmann** (United States of America), said that his delegation had not wished to suggest that the existing text of the Guide was in any way imprecise or in need of change. Its point was that the text was flexible, and that the Guide should contain a balanced discussion on the subject of article X, as it did on other subjects. His recollection was that the Commission had concluded that if article X was included in a footnote to article 4, the Guide should contain a balanced assessment of the kind his delegation was suggesting. He said that his delegation's reasoning and that advanced by the Chairman were not incompatible, and that the secretariat could take them into account.

14. **Mr. García Feraud** (Observer for Ecuador) said that in his view, the agreement reached following the Commission's discussion of article X should be adhered to. That discussion had certainly revealed doubts about the wisdom of providing, in a footnote, for the option to adopt article X, but the opposite point of view had also been expressed: not providing for the approach offered by article X would have had the effect of leaving the limitation period on claims handled through conciliation to run out, with no prospect of halting that period. He urged that there should be no break with past practice, and that the Commission should remain neutral.

15. **Mr. Heger** (Germany) said that in his view paragraph 44 of the draft Guide could be considered to have covered the balanced argument favoured by the United States representative, and he did not see how the text could go any further.

16. **The Chairman** said that the secretariat would take into account the remarks made, paragraph 44 of the draft Guide, and paragraphs 21 and 22 of addendum 1 to the draft Report on the thirty-fifth session (A/CN.9/XXXV/CRP.1/Add.1), to present a neutral and

balanced picture of the advantages and disadvantages of article X in the Guide.

Article 5. Number of conciliators; Article 6. Appointment of conciliators (paras. 45-48 of the draft Guide)

17. **Mr. Holtzmann** (United States of America), referring to the first line of paragraph 47 of the draft Guide, dealing with article 6, questioned the use of the phrase "has to be had". In his opinion, the phrase should be modified, as it currently suggested that there was a strict requirement for reference to an institution or third person. If parties did not reach an agreement on the appointment of a conciliator, they might choose to seek assistance, or they might determine that they did not wish to conciliate since an agreement could not be reached on a conciliator. Furthermore, they could also agree to proceed with two conciliators, since it was already established practice that, in conciliation, an even number of conciliators was not essential.

18. His delegation agreed that provisions in article 6, paragraph (6), on disclosure, were not intended to establish new grounds over and above what was provided under existing contract law, and that there was indeed a need to establish that fact within the text of the draft Guide. His delegation also supported the inclusion of the proposed text, contained in paragraph 2 of document A/CN.9/XXXV/CRP.3, for inclusion in paragraph 47 of the draft Guide.

19. **Mr. Marsh** (United Kingdom) recalled that an earlier version of the article dealing with the appointment of conciliators had operated on the basis that each party would choose between two conciliators. In multiparty disputes, it had been agreed that a joint approach would be taken. It appeared that paragraph 46 of the draft Guide reflected the previous, and not the current, principle. A substantial degree of amendment was therefore required.

20. He also questioned the wording of paragraph 46, as it seemed to suggest that, in discussions on the preparation of the draft Model Law, an approach in which each party appointed its own conciliator was inherently better. It would be inappropriate to retain such wording, as that particular approach had not been adopted as a feature of the draft Model Law.

21. **Ms. Renfors** (Sweden) endorsed the views expressed by the United Kingdom representative with respect to the need for paragraph 46 to be modified in order to reflect the changes made to the article dealing with the appointment of conciliators.

Article 7. Conduct of conciliation (paras. 49-53 of the draft Guide)

22. **Mr. Holtzmann** (United States of America) drew attention to the first line of paragraph 51, which stated that the draft Model Law "does not set out a standard of conduct". He believed, on the contrary, that the Model Law did just that. He further stated that although the second sentence accurately reflected the discussion which had ensued, it should be deleted. The draft Guide should not appear to give instructions to States, or imply that paragraph (3) could be used as grounds for upsetting an award. Similarly, paragraph 52 should be deleted, as there was no need to focus on UNCITRAL Conciliation Rules or to enter into a discussion on national laws.

23. **Mr. Sorieul** (International Trade Law Branch) drew attention to the fact that the current discussion was based on documents A/CN.9/XXV/CRP.1/Add.1 and 2, and that addenda 3, 4 and 5 had already been issued. Changes to the draft Guide had derived from substantive discussions of the text.

24. **The Chairman** recalled that a decision had been taken to retain, in the draft Guide, language which would indicate that the draft Model Law was not creating new grounds for setting aside a conciliation settlement (A/CN.9/XXXV/CRP.1/Add.2).

25. If he heard no objection, he would take it that paragraph 52 of the draft Guide should be deleted.

26. *It was so decided.*

Article 8. Communication between conciliator and parties (paras. 54-55 of the draft Guide)

27. **Mr. Zanker** (Observer for Australia), drawing attention to the first line of paragraph 55, said that he wished to question the mention of "equal treatment" since, in his recollection, the only reference to standard of conduct discussed in the preparation of the draft Model Law had been in the context of fair treatment of the parties by the conciliator. He believed that paragraph 55 was not particularly useful and could therefore be omitted entirely.

28. **Mr. Holtzmann** (United States of America) said he supported the view expressed by the Observer for Australia that paragraph 55 should be deleted. If it had

to be retained, however, it would be more appropriately placed within the context of the discussion on article 7, paragraph (3). He believed that details on the conduct of conciliation should be left to the discretion of the conciliator.

29. **Mr. Jacquet** (France) said that he strongly favoured the retention of paragraph 55, as it was particularly useful. The conciliator was not required to adhere to a mathematical calculation of equality of treatment and of time set aside for each of the parties. He conceded that the first sentence could be regarded as ambiguous, but that the rest of the paragraph served to clarify the nuances in the interpretation of article 8.

30. **The Chairman** recalled that doubts had been raised when the subject was discussed in the Working Group, but that it had been considered worthwhile to include paragraph 55 in the draft Guide.

31. **Mr. Zanker** (Observer for Australia) said that even after taking the entire paragraph into consideration, he returned to the conclusion that paragraph 55 should be deleted. He found nothing in document A/CN.9/XXXV/CRP.1/Add.2 or article 8 that dealt with the issue of time. The issue at hand involved the principle of meetings between the conciliator and the parties, either collectively or separately.

32. **The Chairman** suggested that there had been considerable debate on those issues in the Working Group and suggested that further examination of document A/CN.9/506 might be appropriate.

33. **Mr. Soreuil** (International Trade Law Branch) referred the Commission to the report of the Working Group on Arbitration on the work of its thirty-fourth session (A/CN.9/487), in particular to paragraph 129, which summarized the discussion surrounding introduction of the reference to "equal treatment" in draft article 8. A note of caution had been struck about introducing an operative rule that might result in the imposition of excessive formalism.

34. **Mr. Komarov** (Russian Federation) said that his delegation supported the comments made by the representative of France. Paragraph 55 of the draft Guide should be retained for the benefit of legislators. It was important to stress that equal treatment should be a matter not only of form, but also of substance.

35. **Mr. Marsh** (United Kingdom) said that the reference to equal treatment would be more appropriate to article 7 (Conduct of conciliation), since a party would be more likely to look to that article to provide the basis for a complaint in that regard.

36. **Mr. Tang** Houzhi (China) said that the paragraph should not be deleted, since it reflected the considered view of the Working Group. Equal treatment was an important principle of natural justice, on which the success of any conciliation process depended.

37. **Mr. Holtzmann** (United States of America) said that his delegation wished to propose a compromise solution. The words "The conciliator should afford the parties equal treatment, which however" should be replaced with the words "This provision".

38. **Mr. Tang** Houzhi (China) said that no further compromise solution was necessary, since the text had already been agreed by the Working Group.

39. **Mr. García Feraud** (Observer for Ecuador) said that paragraph 55 as currently drafted was justified, since it alerted the conciliator to the importance of ensuring that the parties did not doubt the fairness of the conciliation process. Mistrust in such situations was common.

40. **The Chairman** said that according to paragraph 129 of the above-mentioned report, the Working Group had agreed at its thirty-fourth session that a reference to the equality of treatment to be given by the conciliator to both parties would be better reflected in draft article 7 (Conduct of conciliation). He thus took it that the reference in question should be included in the draft Guide under article 7.

41. *It was so decided.*

Article 9. Disclosure of information between the parties (para. 57 of the draft Guide)

42. **Ms. Moosa** (Singapore), supported by **Mr. Marsh** (United Kingdom), said that the final sentence of paragraph 56 of the draft Guide was overstated. In some countries, including Singapore, the practice of requiring a party's consent before information could be given to the other party had been found to be conducive to conciliation, since it encouraged both parties to be more forthcoming to the conciliator.

43. **Mr. Sekolec** (Secretary of the Commission) suggested that a reference could be made to the fact that practices such as the ones described by the representative of Singapore that were enshrined in the

mediation or conciliation rules of various providers of such services would be valid if agreed upon, and that the Model Law as drafted would not impede such practices or such agreements, although the default position was the one established in the Model Law.

44. **Mr. Inoue** (Japan) said that the meaning and importance of the term "substance" should be clarified in the draft Guide.

45. **Mr. Zanker** (Observer for Australia), expressing support for the views of the representative of Singapore, drew attention to paragraph 30 of document A/CN.9/XXXV/CRP.1/Add.2, which stated that the draft Guide should contain a clear recommendation to conciliators that they should inform the parties that information communicated to a conciliator might be revealed unless the conciliator was specifically instructed otherwise. The draft should thus be modified accordingly. In Australia, confidentiality was observed in all cases by conciliators, contrary to the practice laid down in the Model Law.

46. **Mr. Holtzmann** (United States of America) said that his delegation appreciated the comments made by Singapore, the United Kingdom, Japan and Australia and associated itself with them. The title of article 9 was confusing, in that it referred to information between the parties, whereas the article dealt mainly with communication between the parties and the conciliator, not between the parties themselves. He suggested, therefore, that the Secretariat should reconsider the sentence in paragraph 56 which read, "The intent is to foster open and frank communication of information between parties", as it did not seem to reflect the thrust of the article.

47. **Ms. Moosa** (Singapore) expressed appreciation to the Secretary of the Commission for his suggestion, which was acceptable to her delegation. It was very important to have that statement, as the practice was becoming increasingly popular.

48. **Mr. Marsh** (United Kingdom) welcomed the Secretary's suggestion on amending the final sentence of paragraph 56. It seemed to go farther, however, than merely suggesting that what was regarded as a best practice should be relegated to the default position. While he did not wish to undermine the agreed wording of the article, he wondered whether a way might be found to suggest in the Guide that the practice could be an acceptable alternative.

49. **Mr. Tang** Houzhi (China) said that his delegation supported the statement made by Singapore and requested the secretariat to improve on the paragraph.

50. **The Chairman** said he took it that there were no objections to adopting either the Singaporean proposal or the secretariat's suggestion.

51. **Mr. Sekolec** (Secretary of the Commission) drew attention to the discussions in the Working Group on Insolvency Law, which was preparing a legislative guide on national insolvency law. Several references had been made in those discussions to non-judicial settlement of disputes that arose in the context of insolvency proceedings or efforts to avoid the initiation of such proceedings. Recent positive experience showed the usefulness of mediation and conciliation as a means of facilitating the resolution of disputes that arose in the context of or preceding insolvency proceedings involving commercial enterprises. He therefore proposed to insert in the Guide the following draft text:

> Experience in some jurisdictions suggests that the Model Law would also be useful to foster the non-judicial settlement of disputes in multiparty situations, especially those where interests and issues are complex and multilateral rather than bilateral. Notable examples of these are disputes arising during insolvency proceedings or disputes whose resolution is essential to avoid the commencement of insolvency proceedings. Such disputes involve issues among creditors or classes of creditors and the debtor or among creditors themselves, a situation often compounded by disputes with debtors or contracting parties of the insolvent debtor. These issues may arise, for example, in connection with the content of a reorganization plan for the insolvent company; claims for avoidance of transactions that result from allegations that a creditor or creditors were treated preferentially; and issues between the insolvency administrator and a debtor's contracting party regarding the implementation or termination of a contract and the issue of compensation in such situations.

52. **The Chairman** said that, if he heard no objections, he would take it that the Commission wished to adopt the secretariat's recommendation, taking into account that it was based on the views of another expert group.

53. **Mr. Barraco** (Italy) requested the Chairman to clarify his understanding that, at a previous meeting, the Commission had adopted a French proposal to change the title of article 9 to "Disclosure of information by the conciliator". The Singaporean proposal made more sense with that title.

54. **The Chairman** said he recalled that there had been such an agreement, but as the text currently before the Commission was the one prepared by the Working Group, it reflected the previous title.

55. **Mr. Zanker** (Observer for Australia) drew attention to paragraph 25 of document A/CN.9/XXXV/CRP.1/Add.2, wherein it was stated that, as the title of the draft article inadequately reflected the scope of the provision, it should, in line with article 10 of the UNCITRAL Conciliation Rules, read "Disclosure of information".

56. **Mr. Tang** Houzhi (China) said it was to be hoped that the secretariat would make the appropriate changes.

57. **Mr. Kovar** (United States of America) said that his delegation generally supported the wide use of conciliation and would be pleased to see the Model Law applied to a wide variety of commercial situations. However, as the proposal had just been presented, his delegation would appreciate an opportunity to consult with insolvency experts on details of the text.

58. **The Chairman** said that the request by the United States to have time for consultations was entirely appropriate; it meant, however, that the Commission could not take a final decision on the proposal at the current meeting. It would be helpful if the United States and other delegations which found themselves in a similar situation could communicate their response to the secretariat by the end of the day.

59. **Mr. Marsh** (United Kingdom) said that, while the secretariat's suggestion was extremely useful, he was concerned at the possibility that providing an example from only one field, namely, insolvency, might create an impression that the use of conciliation was limited to that field. Currently, only a small percentage of commercial conciliations dealt with insolvency issues, whether at the international or national level.

60. **The Chairman** said that, having drafted the first Mexican insolvency law, he could state that it would have been very helpful to be able to refer to the Model Law, together with the Guide and commentaries, as well as the paragraph proposed by the secretariat, even though it referred to only one example.

61. **Ms. Brelier** (France) requested clarification from the secretariat as to where the draft text was to be inserted. Her delegation associated itself with the reserved attitude shown by the United Kingdom and the United States regarding the reference to the discussions in the Working Group on Insolvency Law. It was impossible to foresee what the consequences of such a reference might be; she wondered, however, whether it might pose the risk of a proliferation of extrajudicial remedies.

62. **Mr. Tang** Houzhi (China) said that, in his country, insolvency disputes had to be resolved in court, as no conciliation regime existed; however, there was no law against resolving such disputes through conciliation procedures. The World Trade Organization attached importance to such procedures because of their flexibility.

Election of officers (*continued*)

63. **Ms. Virbickate** (Lithuania), speaking on behalf of the Group of Eastern European countries, nominated Mr. Milassin (Hungary) for the office of Vice-Chairman.

64. *Mr. Milassin (Hungary) was elected Vice-Chairman by acclamation.*

The meeting rose at 1 p.m.